

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

November 14, 2008

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Ref No.: GLS-5913

HAWAII

Amend Prior Board Action of January 27, 2006, Item D-4, Grant of Term, Non-Exclusive Easement Covering Offshore Waters and Submerged Lands to Kona Village Investors, LLC, for Moorings, Swim Platform and Ingress/Egress Corridor, Kahuwai Bay, Kaupulehu, North Kona, Hawaii, Seaward of Tax Map Key: 3rd/ 7-2-10: 10

BACKGROUND:

At its meeting of January 27, 2006, Item D-4, the Board of Land and Natural Resources approved a term, non-exclusive easement covering offshore waters and submerged lands at the Kona Village Resort for mooring, swim platform, and ingress/egress corridor. See Exhibit A attached.

The applicant under the January 27, 2006 submittal was Kona BB Property, LLC. However, by Assignment and Assumption of Lease dated March 13, 2007 and recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 2007-049074, Kona BB Property, LLC assigned all of its leasehold interest in the Kona Village Resort property to Kona Village Investors, LLC, a Delaware limited liability company. As a result, Kona Village Investors, LLC is now the Applicant with respect to this matter.

By appraisal effective January 7, 2007 and accepted by Land Division, the value of the easement was established at \$6,300 per year, or 3% of gross receipts, whichever is greater, for the first ten years. Based on the appraisal, the Office of the Attorney General prepared Grant of Non-Exclusive Easement S-5913 with a 55-year term and annual rental payments of \$6,300, or 3% of gross receipts, whichever is greater, for the term of the easement. The easement instrument was then forwarded to the Applicant for signature. The Applicant signed the instrument on June 20, 2007 and returned it to staff. In the course of further processing, staff discovered that the easement instrument did not specify rental reopening periods.

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Applicant in good standing confirmed:	YES <u>X</u>	NO

REMARKS:

Staff consulted the Office of the Attorney General and was advised to seek the amendment of the prior Board action to include the rental reopening periods in the easement instrument. After consulting with the Land Division central office, staff was directed to explore the possibility of a one-time, lump-sum payment in lieu of periodic payments. Ultimately, however, the decision was made to use the annual rental payment structure with periodic rental reopenings for the term of the easement.

Applicant Kona Village Investors, LLC has not had a lease, permit or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

RECOMMENDATION: That the Board:

- A. Amend its prior Board Action of January 27, 2006, Agenda Item D-4, to require the inclusion in the grant of easement of a rental reopening provision to read substantially as follows:

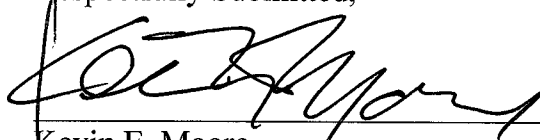
"The annual rental and the percentage rental hereinabove reserved shall be reopened and redetermined as of the day following the expiration of the tenth (10th), twentieth (20th), thirtieth (30th), fortieth (40th), and fiftieth (50th) years of the easement term."

1. All other terms and conditions listed in its January 27, 2006 (Item D-4) approval to remain the same.
2. Review and approval by the Department of the Attorney General; and

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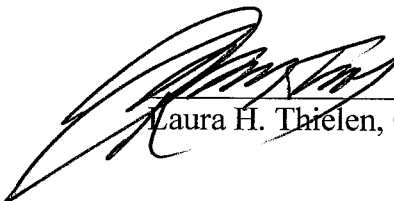
3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Kevin E. Moore
District Land Agent

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

January 27, 2006

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 05HD-255

Island of Hawaii

Grant of Term, Non-Exclusive Easement Covering Offshore Waters and
Submerged Lands to Kona BB Property, LLC for Moorings, Swim Platform and
Ingress/Egress Corridor, Kahuwai Bay, Kaupulehu, North Kona, Hawaii, Seaward
of Tax Map Key: 3rd/ 7-2-10: 010

APPLICANT:

Kona BB Property, LLC, a Delaware limited liability company, whose business and
mailing address is 280 Chestnut, Westmont, Illinois 60559-1139

LEGAL REFERENCE:

Section 171-13 and -53(c), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located seaward of Kaupulehu, North Kona, Hawaii,
identified by Tax Map Key: 3rd/ 7-2-10: 010, as shown on the attached maps labeled
Exhibit A1 to A3.

AREA:

To be determined by survey and subject to approval by the Department of Accounting and
General Services, Survey Division.

ZONING:

State Land Use District: Conservation
County of Hawaii CZO: Not Applicable

D-4

EXHIBIT A

January 27, 2006

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Existing moorings that were installed in the 1960s. See Remarks section for details.

CHARACTER OF USE:

Right, privilege and authority to install, use, maintain and repair, three existing two point commercial moorings, one swim platform mooring, a near shore boat pin, a shoreline post and an ingress/egress corridor, under and across State-owned submerged land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

Annual and percentage rent consideration to be determined by independent appraisal establishing fair market rent, subject to review and approval by the Chairperson.

EASEMENT TERM:

55 years.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Based on reviews by the Army Corp of Engineers and the Office of Conservation and Coastal Lands, the subject moorings are legal, non-conforming uses established sometime between 1962 and prior to the enactment of EIS laws and Chapter 343, HRS. As such the moorings are exempt from both EIS laws, Chapter 343, HRS and CDUA permitting.

DCCA VERIFICATION:

Place of business registration confirmed:	YES
Registered business name confirmed:	YES
Applicant in good standing confirmed:	YES

January 27, 2006

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine annual and percentage rent consideration;
- 2) Provide survey maps and descriptions showing the location of all mooring pins, shoreline post and an ingress/egress corridor in accordance with State DAGS standards and at Applicant's own cost;
- 3) Obtain a title report to ascertain ownership of fast lands known as Kona Village Resort, where necessary, at Applicant's own cost and subject to review and approval by the Department.

REMARKS:

Sometime between 1962 and 1968, prior to the establishment of conservation laws, five moorings buoys, a stern block mooring, a swim platform mooring, a rescue boat pin and a shoreline post used to secure boats to shore for loading of passengers were installed at Kahuwai Bay, Kaupulehu, North Kona, Hawaii by the operators of Kona Village Resort.

In 1978, The United States Army, Corps of Engineers, advised Kona Village Resort that since the moorings were installed prior to December 1968 and did not interfere with navigation, a permit from the Army Corp of Engineers was not required.

In October 2001, the Board approved an "after-the-fact" authorization for the three vessel mooring buoys, the swim platform mooring and passenger loading activities at Kahuwai Bay fronting the Kona Village Resort. The Division of Boating and Ocean Recreation issued annual renewable permits for three two point moorings commencing February 1, 2002. For whatever reason, no permit was issued for the swim platform.

The mooring buoys are used by commercial operators for the purposes of snorkeling, sightseeing and charter fishing tours that are sold by the Kona Village Resort on a fee-for-service basis. The commercial operators that own the vessels are not the permittee under these moorings but instead have mooring or commercial permits operating out of Honokohau Boat Harbor or Kailua-Kona Pier.

Upon attempting to renew the permit for 2005, it was discovered that the ownership for the Kona Village Resort had changed. The change in ownership and the need to redo the permits triggered questions regarding DOBOR's authority to issue mooring permits to a non-vessel owner.

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In response to the department's request, the Department of the Attorney General issued an advice letter. The advice letter concludes that the permits cannot be transferred under the rules and there is no rule that will allow DOBOR to issue a mooring permit to a non-vessel owner. The advice letter further goes on to recommend that a solution may be for Kona BB Property LLC to seek a lease of submerged lands pursuant to Chapter 190D-21, HRS. Based on the advice of the Department of the Attorney General, the request was referred to Land Division for its review and consideration.

In December 1990, the Board approved a CDUA permit for moorings at Anaehoomalu Bay in Waikoloa, Hawaii. In August 1991, the Board approved the issuance of a similar non-exclusive easement for 5 commercial moorings including a swimming platform and an ingress/egress corridor to Waikoloa Beach Association at Anaehoomalu Bay. The moorings are operated in a similar fashion in which commercial operators utilize the moorings by way of agreements with the resort for the purposes of tours that are sold by the hotels. The actual easement document was finally completed in May 1997.

Although the Department of the Attorney General suggested the utilization of Chapter 190D, that specific chapter was primarily directed towards mariculture use. Staff believes that the Board would have the authority to issue a non-exclusive easement in the Kona Village situation pursuant to Chapter 171-13 and 53(c), HRS, similar to that of the Waikoloa case.

A draft of the submittal was circulated to the various federal, state and county agencies for comment. Although staff received a call from the Army Corp of Engineers with questions, staff did not receive any written comment and no specific concerns were relayed. The only other substantive comment made was by the County of Hawaii, Fire Department regarding appropriate access roads for fire apparatus in connection with any and all new buildings. As such, the comment appears to be a standard comment but was not applicable as these are existing moorings in the ocean and does not involve any new buildings.

Although the moorings may be legal non-conforming uses, there was never any appropriate land disposition from the State. Therefore, pursuant to the Board's action of June 28, 2002, under agenda item D-17 which established criteria for imposing fines for encroachments, staff is recommending a fine of \$500 as the subject encroachment is over 100 square feet.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

January 27, 2006

With regard to any special conditions in connection with this proposed non-exclusive easement, staff has the following comments:

1. Staff is recommending that this easement be based on an annual consideration and a possible additional percentage consideration based on the commercial use as may be determined by independent appraisal. The Waikoloa easement was based on a 15 year initial fixed rent but allowed for a possible percentage rent upon the reopening at the end of the 15th year.
2. At the time of DOBOR's submittal to the Board, the Division of Aquatic Resources had some recommendations with regard to the moorings. Although those changes were made, staff has added a recommendation that the moorings be subject to periodic inspections by DLNR at its discretion and that the Applicant be required to make periodic modifications that may be recommended as a result of such inspections.
3. Due to the nature of the moorings, the Applicant will be required to keep the moorings in good condition and repair; provided that should the moorings be substantially or completely destroyed as determined by the Lessor, the easement and all rights granted therein shall cease and terminate without any further action on the part of the Board.
4. As the easement is non-exclusive in over submerged lands, the public shall have access across the ingress/egress areas at all times.
5. Should the Board deem appropriate, the easements shall be subject to relocation at the cost of the Applicant.
6. No rental equipment, sales activity or any commercial sales activity whatsoever shall be permitted seaward of the shoreline.
7. Any and all agreements with concessionaires or what could be considered subleases shall be subject to consent by the Board.
8. All commercial operators shall be properly permitted and licensed with the Division of Boating and Ocean Recreation and any other appropriate maritime agencies.

RECOMMENDATION: That the Board:

1. Impose a \$500 fine for illegal encroachment, under Section 171-6(12).

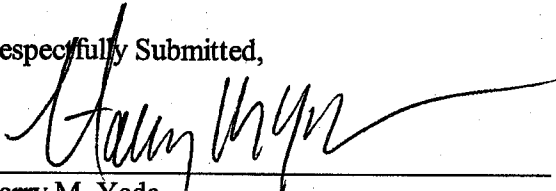
January 27, 2006

2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (3) 7-2-10: 010, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term, non-exclusive easement to Kona BB Property, LLC covering the subject area for the existing commercial two point moorings, a swim platform mooring, a near shore boat pin mooring, a shoreline post and an ingress/egress corridor for passenger loading, under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current term, non-exclusive easement document form, as may be generally amended from time to time, as amended for the purposes of submerged land;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (3) 7-2-10: 010, provided that when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
 - C. The moorings shall be subject to periodic inspections by DLNR at its discretion and the Applicant be required to make periodic modifications that may be recommended as a result of such inspections;
 - D. Due to the nature of the moorings, the Applicant will be required to keep the moorings in good condition and repair; provided that should the moorings be substantially or completely destroyed as determined by the Board, the easement and all rights granted therein shall cease and terminate without any further action on the part of the Board;
 - E. Except for repair and replacement of existing moorings, no additional moorings shall be installed without the specific approval of the Board and compliance of all applicable federal, state and county laws;
 - F. As the easement is non-exclusive and over submerged lands, the public shall have access across the ingress/egress areas at all times;
 - G. Should the Board deem appropriate, the easements shall be subject to relocation at the cost of the Applicant;

January 27, 2006

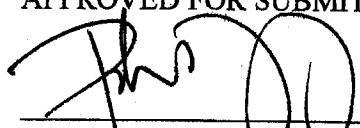
- H. No rental equipment, sales activity or any commercial sales activity whatsoever shall be permitted seaward of the shoreline;
- I. Any and all agreements with concessionaires and/or operators shall be subject to consent by the Board;
- J. All commercial operators shall be properly permitted and licensed with the Division of Boating and Ocean Recreation and any other appropriate maritime agencies;
- K. Review and approval by the Department of the Attorney General; and
- L. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Harry M. Yada
District Land Agent

APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

REDUCED/NOT TO
SCALE

Copyright 1968 by U.S. G.P.O. 16-72

DEPARTMENT OF THE ARMY ENGINEERING CENTER WASHINGTON, D.C. 20315 TITLE: MAP			
ZONE	SECTION	PLAT	10
7	2		

SCALE: 1" = 500 FT

PRINTED

County, State, & section only
 recorded on this map and may
 not be correct. Please refer to
 original map for boundary lines for
 correct record.

FOR PROPERTY ASSESSMENT PURPOSES - SUBJECT TO CHANGE

(PROJ. NO. 19 BC-01-71)

HIGHWAY

KAHIMANU

PLAT 03

QUEEN

7715 + 10

Subject

Site Map

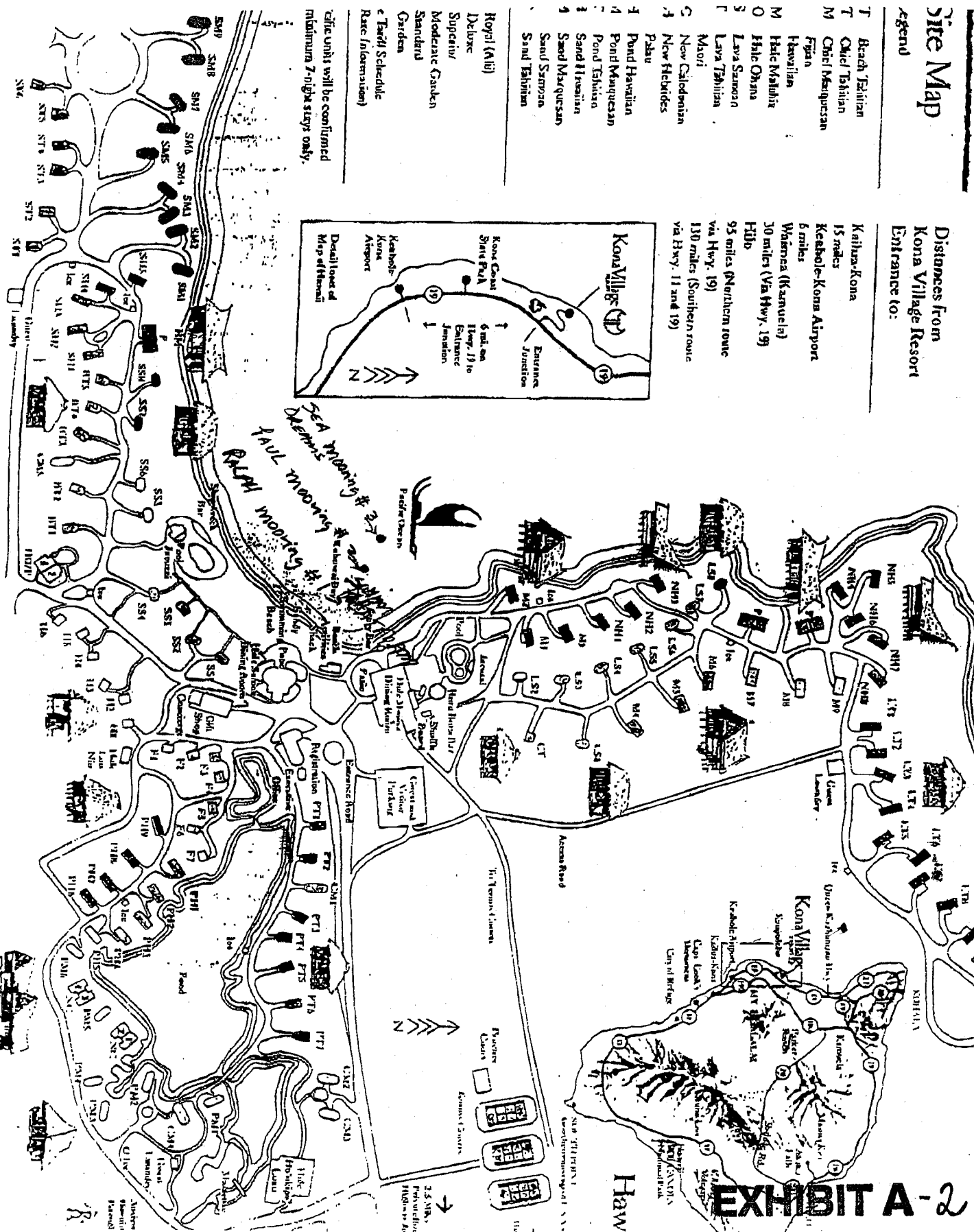
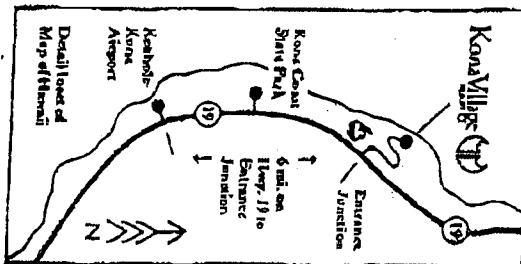
Agenda

- | | |
|-------|-----------------------|
| J | Beach Pavilion |
| T | Chief Tahitian |
| M | Chief Marquesan |
| | Figia |
| | Hawaiian |
| M | Hale Molokai |
| O | Hale Ohana |
| S | Lava Samoa |
| T | Lava Tahitian |
| | Maori |
| C | New Glendonian |
| A | New Hebrides |
| | Pabu |
| F | Pond Hawaiian |
| A | Pond Marquesan |
| | Pond Tahitian |
| I | Sand Hawaiian |
| A | Sand Marquesan |
| | Sand Samoa |
| | Sand Tahitian |
| <hr/> | |
| | Royal (Alii) |
| | Deluxe |
| | Supper |
| | Moderate Garden |
| | Standard |
| | Garden |
| | Tariff Schedule |
| | Race (Identification) |

efficiency will be confirmed
minimum 7-day stays only.

**Distances from
Kona Village Resort
Entrance to:**

- 15 miles
 Kaibara-Kona
 Kiebohe-Kona Airport
 6 miles
 Wainena (Karuwela)
 10 miles (Via Hwy. 19)
 Hilo
 95 miles (Northern route
 via Hwy. 19)
 130 miles (Southern route
 via Hwy. 11 and 19)



Flaw

EXHIBIT A-2

11/20/46

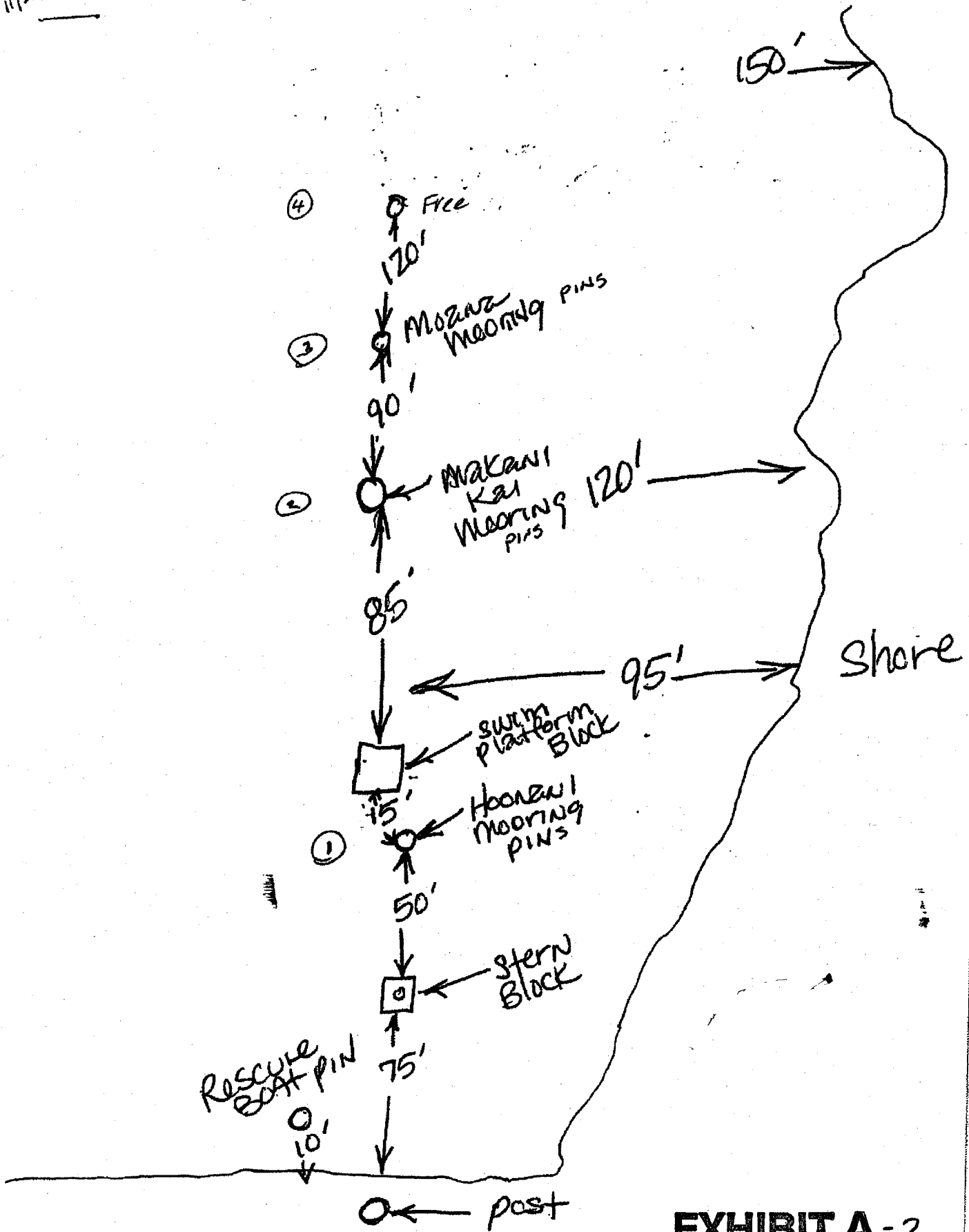


EXHIBIT A-3